



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kinton, Inc.

File: B-228233, B-228234, B-228259, B-228261

Date: January 28, 1988

DIGEST

Protest of exclusion of proposal from the competitive range is denied where the protester has not shown that the technical evaluation finding its proposal unacceptable was unreasonable.

DECISION

Kinton, Inc. protests the exclusion of its proposals from the competitive range under request for proposals (RFP) Nos. DABT60-87-R-0081, DABT60-87-R-0087, DABT60-87-R-0139 and DABT60-87-R-0179, issued by the Army for the design and development of interactive courseware to be used at various Army training facilities. We deny the protests.

Each of the four RFPs was for the development of courseware including lesson plans, exercises and tests in specific subject areas for entry-level service personnel. The awardee under each RFP is to furnish personnel, including subject matter experts, services, facilities, and equipment to design, develop and deliver the courseware based on subject matter supplied by the Army as government furnished material (GFM). According to the Army, the primary objective of all of the RFPs is the development of a "premaster" videotape which will be provided to a videodisc manufacturer for the production of videodiscs.^{1/} Under all the RFPs except for RFP 0081, the contractor will produce the videotape; under RFP 0081, the agency will actually shoot the videotape.

^{1/} In addition to the four RFPs at issue here, Kinton has filed a protest involving another RFP issued by the Army for the same type of work (RFP No. DABT60-87-R-0129). That protest will be considered in a separate decision by our Office because the Army's reasons for rejecting Kinton's proposal under that RFP are different than those under the RFPs here.

The statement of work (SOW) of each solicitation includes a series of contract events including delivery of GFM, contractor delivery of instructional design outlines for each subject area, delivery of courseware, contractor production of videotape (except for RFP 0081), contractor delivery and validation of software and, at various stages, government review and approval of delivered items. The final products to be delivered under the contracts include production management systems data diskettes, premaster videotape, camera-ready copy and validation discs. After final inspection and approval, these items are used to reproduce a quantity of videodiscs for actual training.

The four RFPs called for offers on a cost-plus-fixed-fee basis and provided for award to the offeror submitting an acceptable technical proposal at the lowest evaluated cost. The technical evaluation factors, listed in descending order of importance, were as follows:

1. Sample lesson materials
2. Technical/management proposal
3. Experience and technical qualifications of personnel
4. Ability to complete the contract on time.

The first evaluation factor included three subfactors of equal importance under which offerors were required to submit the following sample lesson materials:

- A. Instructional design outline (IDO)
- B. Premaster videotape
- C. Sample interactive videodisc courseware (IVD).

Offerors were cautioned by section M-1 of each RFP that "[a] major omission and/or gross omission which precludes meeting of program objectives and/or results in substantial impact on areas of manhours, time and funds and which cannot be corrected prior to negotiation without major revisions and/or complete resubmission of the proposal will cause a proposal to be rated technically unacceptable."

Kinton submitted proposals under all four solicitations. To meet the requirement for a sample premaster videotape under RFP 0081, which had the earliest closing date, Kinton submitted one copy of a sample videotape it prepared for a previous Army interactive courseware contract and referenced that sample videotape in its offer under the other RFPs.

The contracting agency received from 8 to 14 proposals under each of the RFPs. After the technical evaluation and rejection of those proposals considered technically unacceptable, five proposals remained in the competitive range under RFP 0087, two remained under RFP 0139 and four remained under RFPs 0081 and 0179. Kinton's proposals were excluded from the competitive range under all four RFPs.

Kinton contends that the evaluation of its proposals and their exclusion from the competitive range were arbitrary and unreasonable. The protester argues, in general, that the reasons given for the elimination of its proposals were in error in some cases and, in other cases, involved minor defects which could be easily corrected. The Army argues that each of Kinton's proposals contained serious deficiencies which rendered them unacceptable.

The evaluation of proposals and determination of whether an offeror is in the competitive range are matters within the discretion of the contracting agency since it is responsible for defining its needs and must bear the burden of any difficulties resulting from a defective evaluation. The International Association of Fire Fighters, B-224324, Jan. 16, 1987, 87-1 CPD ¶ 64. Generally, offers which are unacceptable as submitted and which would require major revisions to become acceptable may be excluded from the competitive range. Twin City Construction Co., B-222455, July 25, 1986, 86-2 CPD ¶ 113. Where a proposal is found unacceptable and therefore outside the competitive range, the agency has no duty to hold discussions with the offeror. Aydin Corp., B-224354, Sept. 8, 1986, 86-2 CPD ¶ 274.

We consider first the Army's decision to exclude Kinton's proposals from the competitive range under RFPs 0087, 0139 and 0179, where the most significant deficiency found in Kinton's proposals was the failure of the firm's sample premaster videotape to meet the RFP requirements for the sample tape.^{2/}

The agency first argues that Kinton's sample tape did not meet paragraph S.2.1 of the RFP specifications which requires the premaster videotape format to be "1-inch" and further states that "[a]ll contractor-produced original tape must be 1-inch videotape format." Kinton argues that this section does not require that the "source footage" for the

^{2/} The Army notes, however, that the sample tape was not considered the major defect in Kinton's proposal under RFP 0081 since, under the contract resulting from that solicitation, the premaster videotape will be prepared by the government, not the contractor.

sample premaster tape be 1-inch; rather, the protester argues, the only requirement is that "original tape" be 1-inch and the Kinton sample met this requirement. In this regard, the agency states that a 1-inch premaster videotape can be made by shooting a 3/4-inch tape as Kinton did and "bumping it up" to 1-inch tape. According to the agency, this results in poor clarity and produces a poor quality image which would be hard for the students to read. The agency wanted 1-inch tape throughout the process to avoid this problem.

We have no reason to disagree with the agency's interpretation of the requirement. Section C-1.1.2.5 of the RFP clearly requires that all resource footage be recorded on 1-inch videotape or on 16mm or 35mm film stock transferred to 1-inch videotape; it does not allow transfer from 3/4-inch videotape as was done in Kinton's sample. Further, section E of the RFP provides that the sample videotape is to be used as a guide for the acceptance of all the videotapes produced under the contract and paragraph S.2.1 states that all contractor-produced original tape must be a 1-inch videotape format. Although Kinton apparently believes that source footage is something other than original tape, there is nothing in the record to support this distinction.

The Army also found that Kinton's sample tape did not meet the requirements of paragraph S.2.3, for maximum luminance of 100 IRE units and minimum luminance of 40 IRE units. According to the Army, Kinton's tape was tested during the evaluation and retested after the protests were filed and found to be outside those limits. Kinton says, however, that after the protests were filed, it had the tape it submitted retested by two independent consultants, both of whom found that the tape meets the S.2.3 luminance standards. In response, the Army states that the tape which Kinton had tested could not have been the specific tape actually submitted with its proposal because that tape has been in the agency's possession since it was submitted.

The RFPs do not appear to provide for the return of samples and Kinton does not explain when or how it retrieved its sample tape from the agency. In any event, the fact that the protester is able to have its own successful test conducted on a tape of the same subject matter does not show that the agency's contrary results were erroneous. See Heckler & Koch, Inc., B-216484.2, Mar. 12, 1985, 85-1 CPD ¶ 303. Consequently, we cannot conclude that the results of the tests conducted on the sample tape were unreasonable.

The Army also rejected Kinton's sample premaster videotape because it did not meet the paragraph S.2.2 requirement that

the Society of Motion Pictures and Television Engineers (SMPTE) non-drop frame time code be recorded on channel three audio at +3VU (volume units). Kinton admits that its tape was recorded on all three channels at 0VU but argues that paragraph S.2.4, contrary to paragraph S.2.2, requires that all audio channels be recorded at 0VU and that its sample tape met this specification. Further, Kinton argues that a +3VU recording level on the time code track constitutes "overmodulation" which would have to be corrected when videodiscs are cut from the premaster videotapes.

We agree with the Army's reading of the solicitation requirements for audio recording levels. Paragraph S.2.2 refers to the recording level of +3VU for the channel three time code track while paragraph S.2.4 refers only to audio channels one and two, which are required to have a reference level of 0VU. Further, according to the agency, the standard time code generator output is +3VU and overmodulation is only a concern if audio channels rather than the time code channel are recorded at +3VU.

Kinton also argues that the Army should not have rejected its sample tape because the same tape was acceptable under other Army contracts with the same requirements, and was used by the Army at a preproposal conference to demonstrate to prospective offerors what was expected under these solicitations. We disagree.

As a preliminary matter, the Army argues that the current solicitations contain specifications different from those in Kinton's previous contracts. The record shows that the most significant difference was the 1-inch videotape format requirement, discussed above, which Kinton itself concedes its sample tape did not meet. Since the requirements were different, it was not reasonable for Kinton to assume that the sample tape from its prior contract would be acceptable under the current RFPs. Similarly, with respect to the use of Kinton's videotape at the preproposal conference, we do not believe it was reasonable for Kinton to assume that its tape was shown to establish a technical quality standard in view of the difference in the specifications for the tape between its prior contract and the current RFPs; rather, we find more plausible the Army's position that the tape was used merely to show a sample of previously developed interactive courseware.

In any event, even if the specifications in Kinton's prior contract and the current RFPs had not been different, the agency was not bound to accept the sample from the prior contract if it reasonably found, based on its evaluation under the current RFPs, that the sample did not meet the specifications. Each procurement is a separate transaction

and the action taken on one procurement does not govern the conduct of all similar procurements. Gross Metal Products, B-215461, Nov. 27, 1984, 84-2 CPD ¶ 577.

As noted above, Kinton submitted the sample tape with its proposal under the RFP with the earliest due date for initial proposals, and incorporated the sample tape by reference in the proposals it submitted under the other RFPs at issue here. Kinton was not advised that it had been eliminated from the competitive range under the earliest RFP until after the due dates for initial proposals under the other RFPs had passed. Kinton argues that the Army treated it unfairly by not advising it of the 1-inch format deficiency in its sample tape before initial proposals were due under the other RFPs. Kinton contends that it had a 1-inch format videotape on its shelves and could have promptly furnished it as a sample.

We do not agree that the Army was required to advise Kinton that its tape failed to meet the specifications in the earliest RFP before the due dates under the other RFPs. Further, there is nothing in the record to indicate that the Army deliberately delayed notifying Kinton of the rejection of its tape under the initial RFP until the closing dates had passed under the other RFPs. In view of the clear requirement in the RFPs for the 1-inch format and Kinton's own statement that it had a 1-inch format tape on hand, we believe the burden properly rested on Kinton, as it did on the other offerors, to submit a sample tape which met the specifications. By choosing to rely on the same sample for all the RFPs, Kinton assumed the risk that the sample would be found unacceptable for all the RFPs.

We also reject Kinton's contention that the sample tape constituted a minor defect which it could have corrected. In this respect, although Kinton says that it could have submitted another tape to meet the 1-inch format requirement, there is no evidence in the record that the firm had on hand other tapes that met the luminance and audio recording level requirements. Further, the Army argues that the defects in the submitted tape could not be easily corrected; the tape would have to be reshot and reedited to meet the RFP production standards.

Based on the record before us, we find that the evaluation of Kinton's sample videotape was reasonable. The sample did not meet the technical specifications in several respects and, under the listed evaluation criteria, those deviations were significant and not easily correctable. The sample requirement was a significant part of the most important evaluation factor and, under the RFPs, the purpose of the sample tape was to demonstrate an offeror's ability to

comply with the required production specifications. Further, under the solicitations' inspection and acceptance clauses, the awardee's sample tape is required to meet the production specifications because it will be used as a standard against which production tapes will be measured under the contract. Accordingly, we conclude that the decision to eliminate Kinton's proposals from the competitive range under RFPs 0087, 0139 and 0179 was proper. See Aquila Technologies Group, Inc., B-224373, Oct. 30, 1986, 86-2 CPD ¶ 500.

We next turn to the Army's decision to exclude Kinton's proposal from the competitive range under RFP 0081. This solicitation included requirements to develop interactive courseware in three subject areas for the Army Logistics School and two subject areas for the Army Transportation School.

Since, as noted earlier, the contractor under RFP 0081 will not be required to produce a premaster videotape, the Army did not downgrade proposals that failed to meet the requirement for an acceptable videotape sample under this solicitation. Thus, although Kinton's sample tape did not meet the listed requirements, the contracting agency did not consider that deficiency a significant reason to reject the firm's proposal. Nonetheless, the Army eliminated Kinton's proposal from the competitive range due to serious deficiencies in its technical proposal.

One of the principal reasons for the elimination of Kinton's proposal was the technical evaluation board's conclusion that the personnel proposed by Kinton could not realistically deliver the five instructional design outlines required by the contract in the time proposed. Kinton has not shown that the Army's conclusion was unreasonable. According to the Army, the outline preparation requires a thorough review of GFM prior to development of each outline, similar to the same work required under Kinton's 1986 contract for similar courseware. Under that contract, the firm took 40 days to review the GFM and prepare outlines for only two subjects. Under RFP 0081, however, Kinton proposed to develop the required outlines for five subject areas using essentially the same staff in 5 working days. The Army also points out inconsistencies in Kinton's proposal which cast further doubt on its ability to deliver the outlines in 5 days. For example, contrary to Kinton's promise to deliver the outlines in 5 days, or 1 work week, Kinton's proposal shows that it would take two instructional technologists 60 hours or 1.5 work weeks each to create the outlines; the proposal also calls for the participation of a computer programmer and an editor, but includes no workhours for either one.

The evaluators also concluded that Kinton did not propose sufficient staffhours overall to accomplish the work required by RFP 0081. In their view, the 2,736 staffhours proposed by Kinton were too low for the projects of either one of the two schools under RFP 0081. The Army says that, based on agency knowledge of the hours required on similar projects, it estimates that 27,156 staffhours will be required for this contract.

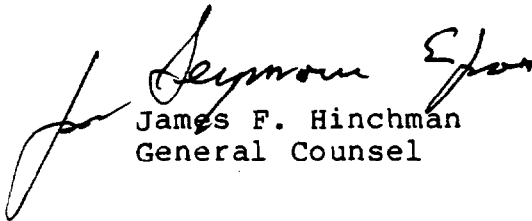
Kinton does not directly refute the agency's estimate of 27,156 staffhours for this solicitation but argues instead that the hours it proposed are comparable to what it proposed under earlier contracts on which it has successfully performed. The Army challenges Kinton's reliance on its proposed hours, arguing that the hours Kinton actually spent on its prior contracts greatly exceeded its proposed hours. Kinton disagrees and maintains that its actual hours were less than its proposed hours. In our view, the record does not clearly show which of the parties' calculations of the hours expressed under the prior contracts is correct. In any event, we need not resolve this issue since, as discussed below, we believe that Kinton's emphasis on the hours involved in its earlier contracts is misplaced.

The Army explains that the solicitations under which Kinton was awarded its earlier contracts included only seven pages of production and design specifications for premaster videotape and printed materials; in contrast, all four current solicitations include 87 pages of requirements for the computer hardware, the software, production of interactive videodiscs courseware, design of interactive courseware printed material and courseware validation. According to the Army, this increase in the number and detail of the requirements reflects the fact that earlier interactive courseware solicitations were generic in nature and that previously no effort was made to individualize the contracts to the needs of the particular schools. The four RFPs involved in these protests are a result of agency efforts to make the interactive courseware procurements more responsive to the specific needs of individual schools. In view of the Army's changed approach to defining its requirements in the current RFPs, we do not believe that there necessarily is a correlation between the actual or proposed hours under the prior contracts and the hours required under the current solicitations.

The Army's decision to eliminate Kinton from the competitive range under RFP 0081 was based on the disparity between Kinton's proposed costs and hours (\$130,019; 2,736 hours) and the government estimate (\$731,365; 27,156 hours). Beyond its reliance on its prior contracts, Kinton makes no showing that the government estimate was unreasonable.

According to the Army, in order to correct the deficiencies in its proposal, Kinton would have to significantly revise its proposal by redefining its labor mix and staff hours and making corresponding changes in its management and cost proposals. A contracting agency may eliminate an offeror from the competitive range where its proposal reasonably is considered so deficient that it would require major revisions to become acceptable. Educational Computer Corp., B-227285.3, Sept. 18, 1987, 87-2 CPD ¶ 274. Here, Kinton's proposed staffhours were only one-tenth of the government estimate. In view of this disparity between Kinton's proposal and the government estimate, we see no basis to question the Army's decision to exclude Kinton from the competitive range.

The protests are denied.


James F. Hinchman
General Counsel